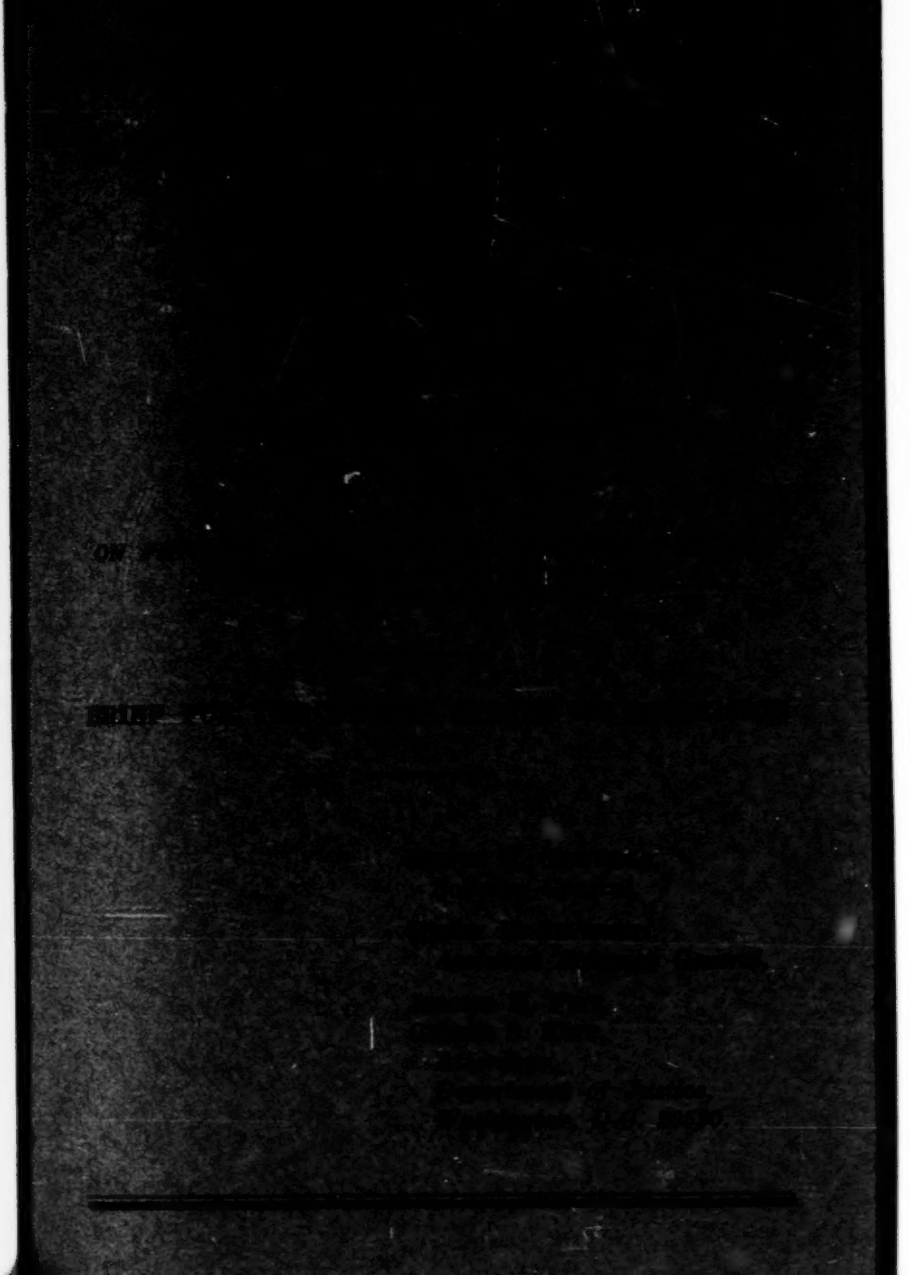

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1386

ALFRED J. ERDOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 10a-18a) is reported at 474 F. 2d 157.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1973. A petition for rehearing was denied on March 15, 1973. The petition for a writ of certiorari was filed on April 13, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court had jurisdiction to try petitioner, an American diplomat, for murder of

a Foreign Service officer committed within a United States embassy in a foreign country.

2. Whether in the circumstances of this case the district court abused its discretion in denying petitioner's motion for a continuance.

3. Whether the trial court erred in excluding from evidence twelve messages from petitioner to the Department of State.

4. Whether the trial judge committed reversible error in limiting petitioner's cross-examination of a prosecution witness.

STATUTES INVOLVED

18 U.S.C. 7 provides:

> The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes:
>
> > (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.
> >
> > (2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of

any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, District, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

18 U.S.C. 1112 provides:

(a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary—Upon a sudden quarrel or heat of passion.

Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due

caution and circumspection, of a lawful act which might produce death.

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of voluntary manslaughter, shall be imprisoned not more than ten years;

Whoever is guilty of involuntary manslaughter, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of voluntary manslaughter within the special maritime and territorial jurisdiction of the United States in violation of 18 U.S.C. 1112. He was sentenced to a ten-year term of imprisonment. The court of appeals affirmed (Pet. App. 10a-18a).

The case involves the killing of a Foreign Service security officer within the United States Embassy at Santa Isabel, Equatorial Guinea.[1] The facts adduced at trial showed that on August 30, 1971, at 4:00 p.m., the American Embassy in Yaounda, Cameroon, received an urgent message from petitioner, the Chargé d'Affaires of the United States Embassy in Equatorial Guinea (G.A. 37, 38).[2] In this message,

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[1] Equatorial Guinea is located in west-central Africa. The capital—Santa Isabel—is in the Province of Fernando Po, which comprises an island 20 miles off the coast of Africa in the Gulf of Guinea.

[2] "G.A." and "A." designate references to the government appendix and the joint appendix in the court of appeals, copies of which we are lodging with the Clerk of this Court.

petitioner stated that "the United States was the victim of a massive conspiracy, * * * that the chancery was surrounded, that he was locked in the vault with his administrative assistant who was a communist agent" and asked for assistance (G.A. 38-39).[3]

As a result of this message, Leonard Shurtleff, American Consul in Douala, Cameroon, was dispatched to Santa Isabel to investigate the situation (A. 21; G.A. 15-16). Arriving at approximately 6:30 p.m., Shurtleff attempted unsuccessfully to locate petitioner and his administrative assistant, Donald Leahy, at their homes; he then proceeded to the embassy (G.A. 16-17). He was met at the front door by petitioner, who refused to admit him (G.A. 17). Petitioner, however, asked Shurtleff to locate his (petitioner's) wife and bring her to the embassy. Shortly thereafter, Shurtleff returned to the embassy with petitioner's wife and son, and Mrs. Leahy (G.A. 18). Petitioner admitted only his wife (Mrs. Erdos) and son (G.A. 18-19). While Mrs. Erdos was in the embassy, Shurtleff was able to overhear a portion of a conversation in which petitioner stated, "You've got to believe me; they will think I'm crazy" (G.A. 19). After approximately an hour, petitioner came out of the embassy and told Shurtleff that "he blew his cool and killed Don Leahy" and that this had been the result of the "terrible pressure he had been under the last few days" (G.A. 20).

---

[3] The complete text of petitioner's message appears at A. 234-237.

Shurtleff entered the then empty embassy and began to check the office (G.A. 20-21). As he entered the vault, he heard a scream (G.A. 21). It was Mrs. Leahy, in a side office which Shurtleff had not checked; she was clutching the body of her husband (G.A. 21). A pair of bloody scissors was found on a nearby desk (G.A. 23).

When Leahy's body was brought back to the United States an autopsy revealed that he had been stabbed ten times, the lethal wound being in the neck (G.A. 7). The post-mortum examination also revealed the presence of spermatozoa in the upper respiratory tract (G.A. 7). The forensic pathologist who conducted the autopsy testified that in his opinion, based upon the nature of the wounds coupled with the presence of sperm in the pharynx and esophagus, Leahy's death was a homosexual murder (G.A. 10).

On September 24, 1971, petitioner, accompanied by counsel, voluntarily flew back to Virginia, where he was placed under arrest.

Petitioner testified in his own defense and admitted that he had killed Leahy by stabbing him with a pair of scissors (G.A. 63-64). However, he asserted a defense based on insanity claiming that the political climate of Equatorial Guinea had caused him to undergo a mental breakdown. He further testified that he had murdered his administrative assistant while acting under the delusion that Leahy was a communist agent and was part of a massive conspiracy against the United States (G.A. 53-62). The defense also presented testimony of two psychiatrists who had

examined petitioner and concluded that, on the date of the killing, he was suffering from acute paranoid psychosis and, as a result, had lacked the mental capacity to appreciate the criminality of his conduct (G.A. 84-85, 88, 95).

In rebuttal, the prosecution introduced the testimony of two psychiatrists who had examined petitioner and found him without psychosis or insanity at the time of the murder (G.A. 116, 126).

ARGUMENT

1. It is well settled that Congress has the power to proscribe the killing of an American citizen by another citizen of the United States within a diplomatic compound located in a foreign country. See, *e.g.*, *United States* v. *Flores*, 289 U.S. 137, 146-147. Petitioner does not argue otherwise, rather he claims that Congress has not exercised that power to proscribe the commission of homicide involving Foreign Service personnel in a United States embassy located in a foreign country.

The answer to this question turns on the scope of 18 U.S.C. 7(3) which provides in part that the special maritime and territorial jurisdiction of the United States shall include—

> Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the

> erection of a fort, magazine, arsenal, dockyard, or other needful building.

Petitioner argues that the third phrase of this section—"any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be"—modifies and thus limits the broad jurisdiction conferred by the preceding two phrases. Petitioner's claim was properly answered in the opinion of the court below on which we rely (Pet. App. 13a):

> Where the power of the Congress is clear, and the language of exercise is broad, we perceive no duty to construe a statute narrowly. The first two phrases connected by the conjunctive "and" relate to and modify each other. The result is to create a jurisdictional category: lands reserved or acquired for the use of the United States and under its exclusive or concurrent jurisdiction. It is only the third phrase, separated from the first two by a comma and the disjunctive "or", that limits jurisdiction to places acquired (within the United States presumably) by the consent of state legislatures. We think the third phrase is independent of and does not modify the first two, and so read, the sentence describes two kinds of places or lands within the "special" jurisdiction of the United States.[4]

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[4] Contrary to petitioner's claim, the courts have generally given the language of the statute its natural breadth. See *United States* v. *Flores*, 289 U.S. 137; *Battle* v. *United States*, 209 U.S. 36; *United States* v. *Rodgers*, 150 U.S. 249. See, also, *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377.

Additionally, we would submit that the "special maritime and territorial jurisdiction of the United States," for which the crime of manslaughter is proscribed by 18 U.S.C. 1112, is not necessarily limited to the areas defined in 18 U.S.C. 7. Section 7 provides only that the term "special maritime and territorial jurisdiction of the United States" as used in Title 18, "includes" the areas there set forth. There is nothing in Section 7 which limits the definition of "special maritime and territorial jurisdiction" only to the circumstances there enumerated, and both reason and justice compel the conclusion that it should be held to encompass a crime committed in a United States embassy involving citizens and employees of the United States. A United States embassy, as the court of appeals held, has traditionally been considered to be "constructively" part of the territory of the United States (Pet. App. 12a).[5] And testimony at trial showed that (A. 28-29):

> [As] a matter of diplomatic practice * * * an American embassy chancery, the building, and the Ambassador's residence cannot be entered by anyone without the approval of the authorities in charge. It is the same sort of principle that applies to a diplomatic pouch when it is under seal. If the pouch comes through the airport, the authorities of another government may not open the pouch without violating diplomatic practice and immunity.

[5] Cf. *United States* v. *Bowman*, 260 U.S. 94, 98-99, so describing a privately owned ship sailing under the United States flag.

Moreover, offenses against Foreign Service officers employed in the embassy are not merely private offenses but also have a serious impact on government operations and on our relations with other nations. Cf. *United States* v. *Bowman*, 260 U.S. 94, 98. The record here established that the murder of Mr. Leahy resulted in serious difficulties in our relationship with Equatorial Guinea and a temporary halt of the day-to-day operations of the American Embassy (A. 32-34).

While the legislative history of Section 7 (Pet. 14-17) does not indicate that Congress expressly contemplated the construction adopted by the court of appeals or that which we urge here, this construction is nevertheless consistent with the language of Section 7 and Section 1112, and the canon of construction that statutes not be construed to permit "absurd or futile results." *United States* v. *American Trucking Associations*, 310 U.S. 534, 543. The construction of Section 7 urged by petitioner would attribute to Congress the intention of permitting the brutal murder of a Foreign Service officer by an other government official, committed in a United States embassy, to go unpunished. Without some affirmative expression of congressional intent to accomplish this result, the court of appeals properly rejected such a construction. As this Court held in an analogous context:

> Under such circumstances, our duty as a Court is to construe the * * * [statute] as our judgment instructs us the lawmakers, within consti-

tutional limits, would have done had they acted at the time of the legislation with the present situation in mind. [*Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 388.] [6]

In sum, given the inherent reasonableness of the construction placed on Section 7 by the court of appeals, and the fact that, as petitioner notes (Pet. 17), Congress is now considering proposals which will clarify any ambiguity in the statute, there is no reason for further review on this issue.

2. Petitioner contends that the trial court erred in denying his motion for a two-month continuance. The continuance was sought to permit petitioner additional time to obtain the testimony of three foreign diplomats (representatives of France, Nigeria, and Spain), all of whom allegedly had the opportunity to observe petitioner's conduct immediately preceding and following Leahy's murder.

As petitioner notes, each of these potential witnesses was a foreign national and thus not subject to the jurisdiction of the district court. The State Department, however, undertook to assist the defense

[6] In *Vermilya-Brown Co.* v. *Connell*, *supra*, it was held that the Fair Labor Standards Act which by its terms was applicable to "any State of the United States or the District of Columbia or any Territory or possession in the United States," applied to a military installation in Bermuda leased by the United States from Great Britain. Such an installation was held to be a "possession" of the United States within the meaning of Section 3(c) of the Act even though the leased area was under "the sovereignty of Great Britain and * * * it [was] not territory of the United States in a political sense, that is, a part of its national domain" (335 U.S. at 379-381).

in obtaining this testimony. Through the State Department, inquiries were forwarded to the respective foreign governments, requesting their assistance in making these witnesses available (A. 114-126). Prior to trial, Spain refused to make its representative available; the governments of Nigeria and France did not respond to the State Department's requests.[7] Thus, the trial court was presented with a situation where petitioner was unable to show when these witnesses could be produced, or even suggest, absent pure speculation, that they could ever be produced. Under these circumstances, there was no abuse of discretion in denying a postponement of trial. See *Blackwell* v. *United States*, 405 F. 2d 625, 627 (C.A. 5), certiorari denied, 395 U.S. 962.

Petitioner's claim that the testimony of these officials should have been stipulated to by the United States Attorney is without merit. Although these officials had been interviewed by the United States Ambassador to Equatorial Guinea, who was sympathetic to petitioner and testified as a defense witness, they had not been interviewed by the United States Attorney or any federal law enforcement officer, nor had they made any statements under oath and subject to cross-examination. The decision in *Chambers* v. *Mississippi*, No. 71-5908, decided January 21, 1973, cited by petitioner (p. 18), is of no assistance to him. There the Court reaffirmed the well-settled

[7] We are advised by the Department of State that after the trial it received word from Nigeria that it would not make its Ambassador available.

principle that "[o]ut-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury" (slip op. 14).

The Court further noted in *Chambers* that "[a] number of exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination" (*ibid.*). But the out-of-court statements here, unlike those in *Chambers*, were made by petitioner's friends and colleagues under circumstances that did not in any way tend to "assure reliability."

Moreover, a review of the proposed stipulations indicates that a good deal of the testimony petitioner sought to elicit was inadmissible or cumulative and that petitioner was not prejudiced either by the failure to stipulate or the absence of these witnesses.

a. Petitioner claimed that the French Chargé d'Affaires, Jean Robert, would testify that while petitioner "seemed agitated and abrupt" on the day prior to the murder, on the following day (shortly before the crime was committed) Mr. Robert found petitioner in a "better frame of mind," "laughing" about the circumstances which caused him to be up-

set the day before (A. 171-172). This evidence would actually have contradicted petitioner's claims. Moreover, Mr. Robert's conclusion that the murder was "an act of madness" was plainly inadmissible (A. 172).

b. The proposed testimony of the Nigerian Ambassador and the Spanish Chargé d'Affaires (A. 173-179) related principally to (1) petitioner's apparent condition and his self-serving statements after the offense (which were, in any event, testified to by petitioner, his wife, and, to a more limited extent, by the United States Ambassador (Tr. 680)), and (2) the political situation in Equatorial Guinea and its alleged effect on petitioner. The political situation was, however, shown by message traffic with the Department of State. Moreover the testimony of the United States Ambassador, who was temporarily in the United States at the time of the crime, to the effect that he was disturbed by the less than coherent messages petitioner was sending back home (Tr. 675-676, 679-680), lent far more support to petitioner's case than the several vague references in the proposed stipulations.

In any event, as previously noted, neither the Spanish nor Nigerian governments would make these officials available.[8] There was, therefore, no error in denying the motion for a continuance.

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[8] The district court did not abuse its discretion in refusing to admit Defense Exhibit 69 which petitioner claims was "a transcript of the message which [petitioner] Erdos described preparing with the aid of Leahy the morning of Leahy's death" (Pet. 21, n. 9). The message was decoded from a tape

3. Petitioner also asserts as error the trial court's ruling that certain messages from him to the State Department were inadmissible. The messages in question were transmitted between June 15 and August 21, 1971, and contained petitioner's observations on the political situation in Equatorial Guinea. The vast majority of the message traffic, comprising over fifty exhibits, was admitted without objection (A. 216-217). While petitioner seeks to couch the district court's exclusion of some of the messages in terms of "executive privilege," and thus bring the ruling within the terms of *United States* v. *Reynolds*, 345 U.S. 1, it is clear that the prosecution's objection was sustained on the basis of relevancy. Indeed, the trial judge in responding to petitioner's request for clarification of the ruling, stated that "they contain confidential information and reports involving a foreign country which the Court, upon examining the documents, is of the opinion it has no relevancy really even on his state of mind" (A. 217). This ruling reflected a permissible exercise of discretion in the context of this case. Moreover, most of

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found in the embassy burn bag that was returned to Washington. Petitioner, however, testified he did not prepare the particular message and didn't know who did (Tr. 628). Petitioner could not even say where it came from (Tr. 629). Likewise he was unable to say the exhibit was the exact copy of the handwritten copy which he claimed he wrote and destroyed (Tr. 629). Moreover, in light of the admission into evidence of the irrational message petitioner had earlier sent on the day of the murder to the American Embassy in Cameroon (see *supra*, pp. 4-5), any error in the exclusion of this evidence was harmless.

the messages were admitted, and petitioner was permitted to testify about the contents of the exhibits that were excluded.

4. Finally, petitioner claims the trial court committed reversible error in prohibiting his cross-examination of one of prosecution's rebuttal witnesses, a psychiatrist, by using a psychiatric treatise. This contention was fully considered by the court below (Pet. App. 16a-18a); it properly concluded that, while it may have been better practice to permit cross-examination from the text, it "was not error so grave as to require reversal where extensive evidence was properly admitted on the issue in question" (Pet. App. 18a).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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